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Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP ONE METROPOLITAN SQUARE SUITE 2600 ST. LOUIS, MO 63102				KIDWELL, MICHELE M
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte CHRISTOPHER P. OLSON,
LARRY H. SAWYER, and SHIRLEE A. WEBER

Appeal 2009-004375
Application 10/038,863
Technology Center 3700

Decided: March 29, 2010

Before: WILLIAM F. PATE III, JOHN C. KERINS, and
MICHAEL W. O'NEILL, *Administrative Patent Judges*.

PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 1-5, 7-18, 20, 22-28, 30 and 31. App. Br 2. We have jurisdiction under 35 U.S.C. § 6(b).

The claims are directed to a wetness indicator and a garment comprising a wetness indicator. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A wetness indicator for alerting a wearer to urination comprising a liquid permeable enclosure having an interior volume and a liquid absorbent body therein, said liquid absorbent body absorbing liquid in the presence thereof and having an unrestrained volume upon absorption of a preselected amount of liquid, said unrestrained volume of the absorbent body being substantially greater than the interior volume of the enclosure such that the absorbent body applies an expansion pressure to the enclosure upon absorption of said preselected amount of liquid, said enclosure limiting expansion of the absorbent body so that the wetness indicator stiffens as liquid is absorbed, said wetness indicator having a first stiffness when dry and a second stiffness greater than said first stiffness upon absorption of said preselected amount of liquid.

REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Glaug	US 5,797,892	Aug. 25, 1998
Weber	US 6,221,460 B1	Apr. 24, 2001

REJECTIONS

Claims 1-5, 7-17, 20, 22, and 23 stand rejected under 35 U.S.C. § 102(a) as being anticipated by Weber. Ans. 3.

Claims 1, 2, 11-18, 22-24 and 30 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Glaug. Ans. 6.

Claim 6 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Weber. Ans. 9.

Claims 25-28 and 31 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Glaug. Ans. 9.

OPINION

Appellants contend that in each of the rejections listed above, the Examiner erred by finding that both Weber and Glaug disclose the claimed “second stiffness greater than said first stiffness” upon absorption of liquid as recited in independent claims 1, 12 and 25. App. Br. 5-20. We agree.

“[T]he PTO applies to the verbiage of the proposed claims the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in applicant’s specification.”

In re Morris, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

“Stiffness” is explicitly defined by the Specification, consistent with its ordinary meaning, to mean “the force exerted upon the wetness indicator divided by the deflection.” Spec. 14:13-14. We therefore decline to adopt the definition proposed by the Examiner. Ans. 8, 11, 14.

The express, implicit, and inherent disclosures of a prior art reference may be relied upon in the rejection of claims under 35 U.S.C. §§ 102 or 103. In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic *necessarily* flows from the teachings of the applied prior art. *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990).

The Examiner's finding that Weber's absorbent body would inherently have a second stiffness greater than a first upon absorption of liquid because Weber's absorbent body is a "superabsorbent material" is not supported. Ans. 4; Weber Col. 6, ll. 14-23. Superabsorbancy relates to the weight of liquid a material can absorb. It does not provide any evidence that relates to how much deflection a structure will exhibit in response to an applied force. Thus, Weber does not provide any means to determine any particular relationship between the stiffness and wetness of her absorbent body 50.

The Examiner's finding that Glaug discloses the claimed "second stiffness greater than said first stiffness" upon absorption of liquid is also unsupported. While Glaug discusses the volumetric expansion of his absorbent body 82 when wet, and measures that expansion under an applied load, there is no indication of any particular deflection of that member under an applied load. Glaug col. 15, l. 7 – col. 16, l. 41. The fact that Appellants also employ a volumetric expansion within a restraining enclosure to create the resultant stiffness change does not necessarily mean that Glaug's volumetric expansion will produce the same result. Glaug does not provide any indication regarding how enclosure 52 will react to wetness, and subsequent volumetric change of the absorbent body 82. Enclosure 52 could expand with absorbent body 82 or the stiffness of both structures may decrease upon wetting like a typical sponge. Glaug does not provide sufficient information to determine whether the structure relied upon by the Examiner necessarily exhibits the claimed "second stiffness greater than said first stiffness" upon absorption of liquid. The fact that Glaug perceives the same problem, alerting a wearer to wetness, is not sufficient to establish that

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Glaug's solution of providing a "dimensional change sensation" is the same as providing the claimed "stiffness" change sensation. Glaug col. 2, ll. 26-31.

Since the Examiner erred in finding that Weber discloses a "second stiffness greater than said first stiffness" upon absorption of liquid, we must reverse the rejection of claims 1-5, 7-17, 20, 22, and 23 as being anticipated by Weber.

Since the Examiner erred in finding that Glaug discloses a "second stiffness greater than said first stiffness" upon absorption of liquid, we must reverse the rejection of claims 1, 2, 11-18, 22-24 and 30 as being anticipated by Glaug.

Since the Examiner relies upon the same flawed finding for concluding that the subject matter of claims 6, 25-28 and 31 would have been obvious, the rejections of claims 6, 25-28 and 31 as being unpatentable over Weber and Glaug, respectively, must also be reversed.

DECISION

For the above reasons, the Examiner's rejections of claims 1-18, 20, 22-28, 30 and 31 are reversed.

REVERSED

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